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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY HURTADO,

Defendant and Appellant.

D041165

(Super. Ct. No. MH0042)

APPEAL from an order of the Superior Court of Imperial County, Matias R. Contreras, Judge. Affirmed.

Ricky Hurtado appeals an order recommitting him for two years as a sexually violent predator (Welf. & Inst. Code, § 6600 et. seq.) following a jury trial. He contends the trial court erred in admitting evidence of assessment results obtained from use of the "Static-99, " which he identifies as scientific evidence, without holding a hearing to determine its reliability or general acceptance within the scientific community. We conclude that testimony based on Static 99 does not fall within the *Kelly/Frye* rule

(*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013).

FACTUAL BACKGROUND

Dr. Berle Davis and Dr. Dale Arnold, psychologists, testified after reviewing probation reports, court proceeding transcripts, parole documents, hospital and health records, and prison rules violation reports, and interviewing Hurtado's treating psychiatrist. In Dr. Davis's and Dr. Arnold's opinion Hurtado was a sexually violent predator because he had committed violent sexual acts upon children including sodomy and oral copulation and forcibly sodomized and forced another inmate to orally copulate him. They testified that Hurtado has repeatedly violated grants of parole by being in the company of a minor, making sexual comments to minors, and propositioning a minor. Hurtado declined to meet with the doctors. His treating psychiatrist told the doctors who testified that Hurtado was not participating in treatment and had made no progress.

In evaluating Hurtado's risk of recidivism, the doctors considered factors they believed correlate with the risk of reoffense. They considered "static" factors that do not change over time like the number of victims and the types of victims, and "dynamic" factors that are capable of change like family support and current treatment. While

considering the static factors, the doctors used an analysis of two research doctors that correlated the probability of reoffense with a risk assessment tool known as Static-99.¹

Hurtado called Dr. Terrence Campbell to testify. Dr. Campbell disagreed with Hurtado's risk of reoffending given in the opinion of Dr. Davis and Dr. Arnold. He specifically criticized reliance on the Static-99. Campbell testified that Static-99 and other assessment tools were in their infancy and studies have reported their inaccuracy.

¹ Describing the Static 99, Dr. Davis testified: "The Static-99 is an actuarial risk assessment tool, not a test. It's a list of factors that have been found to be related to risk of reoffense. And what Dr. Hanson and a psychologist from England, Dr. Thornton, did was look at two separate risk assessment tools that they have had. One that Dr. Hanson had was the — we call it the RRASOR. It's the rapid risk assessment of sexual — I can't remember exactly the title. Sex offender recidivism is what it is. [¶] And then an assessment tool that Dr. Thornton in England had. They found that by looking at the factors in both of those assessment tools that they had a better ability to identify those individuals who would be at risk. [¶] It's not a perfect tool. It's really in the infancy of our ability to use any kind of assessment tool. We — I would not use this tool and say, 'this person has this score; therefore, they're going to reoffend.' You cannot do that. The best you can do is when you score an individual on the Static-99 you look at the items that you have scored, and you say that this person falls within a group of people who have been found to have this probability of reoffending, so the best that you can do is say that they fall within that group of people. Not that they're going to reoffend, but that there is a likelihood that they would reoffend. And they do give probabilities when you score this tool, but, again, it's not a probability. [¶] And it gets a little confusing there. I think it gets confusing even for those of us who use it, because even though you could say, 'Well, all right. There's a 39-percent probability with this score,' you can't say there's a 39-percent probability that this person will reoffend. That's not what it means. It simply means that there is a 39-percent probability that this person falls into this group of people who did reoffend, so that's as close as you can come to it. [¶] But even though there's an uncertainty there, it was found to be more effective than, say, somebody like myself who has treated a number of sex offenders. And I have my own subjective feeling about what it is that made these men tick, if you will. That has been demonstrated in the past not to be effective, because it's subjective. [¶] So it has been found that we do better looking at these factors that have been identified with risk of reoffense. The Static-99 simply lists a number of factors that have been identified in other individuals who have reoffended, and we see if the people that we are assessing have these factors or not."

DISCUSSION

"[U]nder the *Kelly/Frye* rule the proponent of evidence derived from a new scientific methodology must satisfy three prongs, by showing, first, that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that "correct scientific procedures were used in the particular case.'" (*People v. Roybal* (1998) 19 Cal.4th 481, 505.) Hurtado recognizes that the *Kelly/Frye* rule has been held not to apply to medical expert opinion that a defendant suffers from a mental disorder, a predicate fact for commitment (see *People v. Ward* (1999) 71 Cal.App.4th 368, 373), but argues that the objection here was not to the opinion but focused on the actuarial tools the witnesses relied upon. In *Ward*, the reviewing court held that mental health experts are not restricted in the methodology they rely upon to develop a prediction about future dangerousness. (*Id.* at pp. 373-375.) As the Supreme Court said in *People v. Stoll* (1989) 49 Cal.3d 1136, 1154, "[n]o precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about behavior." A psychological evaluation "is a learned professional *art*, rather than the purported exact 'science' with which *Kelly/Frye* is concerned." (*Id.* at p. 1159.)

Here, Dr. Davis and Dr. Arnold emphasized that the factors listed in Static-99 help psychologists evaluate the likelihood of a defendant reoffending, but is not a complete evaluation of risk factors associated with the likelihood of recidivism. Both doctors testified that they considered the factors set out in Static-99 but considered other factors as well in assessing the likelihood of recidivism.

The static factors listed in Static-99 include the number of prior sex offenses, the prior sentencing dates, conviction of non-contact sex offense, whether the current charge or the prior offenses involved violence, whether the prior offenses involved unrelated victims, whether the victims were strangers, whether the victims were male, the age of the perpetrator, and whether the perpetrator has lived with another in a love relationship. The doctors considered the number of Hurtado's prior sex offenses, the number of prior sentencing dates, Hurtado's prior conviction of a non-contact sex offense, his victims were not related to him, his victims were strangers, his victims were males, and Hurtado's age. The doctors considered important Hurtado's wide range of potential victims -- adults and children, acquaintance or strangers, his callous disregard for others, the early onset of his sexual offenses, and his long-standing refusal to take part in treatment. The doctors' opinion that Hurtado was likely to reoffend was based in part on consideration of factors listed in Static-99, other static factors, and in part on dynamic factors like his failed supervision in the community, Hurtado's failure to recognize his need for treatment, his inability to form acceptable close relationships, and placing himself near children.

While discussing the purpose for the *Kelly/Frye* rule, the Supreme Court pointed out the danger when an "unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury." (*People v. Stoll, supra*, 49 Cal.3d at p. 1156.) However, psychological predictions of a defendant's future dangerousness are not subject to the *Kelly/Frye* rule. (*Id.* at p. 1157.) In *People v. Stoll*, the Supreme Court said:

"[A]bsent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*. This distinction was recently confirmed in our unanimous decision in *People v. McDonald* [1984] 37 Cal.3d 351. There we found prejudicial error in the exclusion of defense expert testimony on the psychological factors undermining the accuracy of eyewitness identification. In dispensing with any need for a *Kelly/Frye* showing in that case, Justice Mosk noted that '[w]hen a witness gives his personal opinion on the stand — even if he qualifies as an expert — the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. . . . [¶] . . . We have never applied the *Kelly/Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association [citations]." (*People v. Stoll, supra*, 49 Cal.3d at p. 1156.)

The psychological experts here testified that they considered Static-99 as one risk assessment tool that led to their opinion that Hurtado is a sexually violent predator. The trial court did not err in admitting evidence based in part on consideration of Static-99 without holding a *Kelly/Frye* hearing.

DISPOSITION

The order is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.